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No. 05-1284

IN THE
Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

STEVEN EUGENE CAULEY
JAMES ALLEN CARNEY
MARCUS N. BOZEMAN
CAULEY, BOWMAN, CARNEY & WILLIAMS, PLLC
11311 Arcade Drive
Suite 200
Little Rock, Arkansas 72212
(501) 312-8500

DAVID C. FREDERICK
Counsel of Record
MARK L. EVANS
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

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QUESTION PRESENTED

Whether a private actor doing no more than complying with federal regulation is a "person acting under" a federal officer for the purpose of 28 U.S.C. § 1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. THE FEDERAL OFFICER REMOVAL STATUTE PROTECTS ONLY THOSE AIDING OR ASSISTING FEDERAL OFFICERS IN PERFORMING OFFICIAL DUTIES 11

A. The Text Of The Federal Officer Removal Statute Shows That It Is Limited To Private Parties Assisting In Performing Official Duties 11

B. The History And Purposes Of The Federal Officer Removal Statute Confirm That The "Acting Under" Clause Applies Only To Those Who Aid And Assist Federal Officers 16

C. This Court's Decisions Establish That The "Acting Under" Clause Protects Only Those Assisting In Performing Official Functions 19

D. A Private Party Complying With Federal Regulatory Requirements Is Not Thereby "Assisting" A Federal Officer In Enforcing Federal Law 23

II. THE EIGHTH CIRCUIT'S COMPREHENSIVE-AND-DETAILED-CONTROL TEST DOES NOT COMPORT WITH THE STATUTORY TEXT OR PURPOSES 28

A. The Eighth Circuit Erred In Construing The Statutory Text 28

B. The Eighth Circuit Misapprehended The History And Purposes Of The Federal Officer Removal Statute 30

C. The Eighth Circuit's Assumption That Private Regulated Parties Have The Same Status As Government Contractors Is Unwarranted 32

D. The Eighth Circuit's Test Would Substantially Expand Federal Jurisdiction 34

III. THE FTC'S "REGULATION" OF LIGHT CIGARETTES IS INSUFFICIENT TO TRANSFORM PHILIP MORRIS INTO A PERSON "ACTING UNDER" A FEDERAL OFFICER 39

A. The 1970 Voluntary Agreement Does Not Establish That Philip Morris Is Entitled To Federal Officer Removal 39

B. The FTC's Cessation Of Cigarette Testing Does Not Entitle Philip Morris To Federal Officer Removal 42

C. The FTC's Consent Orders With Other Tobacco Companies Do Not Show That Philip Morris Is Heavily Regulated 44

CONCLUSION 48

TABLE OF AUTHORITIES

Page

CASES

Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954) 15

American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) 13, 14, 24

Arizona v. Manypenny, 451 U.S. 232 (1981) 16, 17, 21

Bakalis v. Crossland Sav. Bank, 781 F. Supp. 140 (E.D.N.Y. 1991) 33

Bates v. Dow AgroSciences LLC, 544 U.S. 431 (2005) 35

Beard v. Burts, 95 U.S. 434 (1877) 12

Blum v. Yaretsky, 457 U.S. 991 (1982) 14

Bragdon v. Abbott, 524 U.S. 624 (1998) 22

Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) 25, 27

Brown v. Duchesne, 60 U.S. (19 How.) 183 (1857) 16

Brown v. Philip Morris Inc., 250 F.3d 789 (3d Cir. 2001) 14

Bryant Bros. Co. v. Robinson, 149 F. 321 (5th Cir. 1906) 32

Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001) 35

California v. ARC America Corp., 490 U.S. 93 (1989) 36

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 31

Chicago Deposit Vault Co. v. McNulta, 153 U.S. 554 (1894) 12

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 32

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 31

City of Greenwood v. Peacock, 384 U.S. 808 (1966).....3, 10, 14, 16, 22, 23, 28

City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941).....38

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).....25

Clinton v. Jones, 520 U.S. 681 (1997).....17

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).....29

Colorado v. Symes, 286 U.S. 510 (1932).....10, 16, 17, 30

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993).....35

Davis v. Eagle Coal & Dock Co., No. 33054, 2006 WL 3543017 (W. Va. Dec. 4, 2006).....34

Davis v. South Carolina, 107 U.S. 597 (1883).....10, 19, 20, 21, 28

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).....14

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).....36

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981).....36

Findley v. Satterfield, 9 F. Cas. 67 (C.C.N.D. Ga. 1877) (No. 4792).....14, 18

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).....36

FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985).....5, 6, 40, 41

Fung v. Abex Corp., 816 F. Supp. 569 (N.D. Cal. 1992).....32

Gay v. Ruff, 292 U.S. 25 (1934).....16, 17, 24

Geier v. American Honda Motor Co., 529 U.S. 861 (2000).....31, 35

General Motors Corp. v. Abrams, 897 F.2d 34 (2d Cir. 1990) 47

Gnerich v. Rutter, 265 U.S. 388 (1924) 12

Gulati v. Zuckerman, 723 F. Supp. 353 (E.D. Pa. 1989) 32

Healy v. Ratta, 292 U.S. 263 (1934) 37

International Primate Prot. League v. Administrators of Tulane Educ. Fund, 500 U.S. 72 (1991) 4, 18, 29, 30

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 14

Jefferson County v. Acker, 527 U.S. 423 (1999) 13, 18, 29

Johnson v. Wells, Fargo & Co., 98 F. 3 (C.C.N.D. Cal. 1899) (No. 12739) 25, 26, 32

Kircher v. Putnam Funds Trust, 126 S. Ct. 2145 (2006) 2

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 29

Lorillard v. Pons, 434 U.S. 575 (1978) 22

Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) 3

Maryland v. Soper, 270 U.S. 9 (1926) 10, 21, 28

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 35

Mesa v. California, 489 U.S. 121 (1989) 28, 29, 30, 38

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 23

Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) 36

National Archives & Records Admin. v. Favish, 541 U.S. 157 (2004) 26

Neal v. Clark, 95 U.S. 704 (1878) 12

Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989) 18

Paldrmic v. Altria Corporate Servs., Inc., 327 F. Supp. 2d 959 (E.D. Wis. 2004) 33, 42

Polk County v. Dodson, 454 U.S. 312 (1981) 13, 24, 25

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 36

Richardson v. McKnight, 521 U.S. 399 (1997) 19

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 37

Screws v. United States, 325 U.S. 91 (1945) 10, 13, 30

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941) 29, 37

Shumpka, In re, 268 F. 686 (N.D.N.Y. 1920) 26

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 31

Stafford v. Briggs, 444 U.S. 527 (1980) 16

Tennessee v. Davis, 100 U.S. 257 (1880) 1, 4, 17, 31

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 34

United States v. Armour & Co., 402 U.S. 673 (1971) 46, 47

United States v. Bass, 404 U.S. 336 (1971) 27

United States v. Classic, 313 U.S. 299 (1941) 13

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961) 45

United States v. Philip Morris Inc., 263 F. Supp. 2d 72 (D.D.C. 2003) 42

United States v. Philip Morris USA, Inc., Civ. A. No. 99-2496 (GK) (D.D.C. Aug. 17, 2006), *at* http://www.dcd.uscourts.gov/opinions/2006/99-2496-082006a.pdf 41

Virden v. Altria Group, Inc., 304 F. Supp. 2d 832 (N.D. W. Va. 2004) 33, 42

Ward v. Congress Constr. Co., 99 F. 598 (7th Cir. 1900) 32

West v. Atkins, 487 U.S. 42 (1988).....33

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 27

Willingham v. Morgan, 395 U.S. 402 (1969) 1, 3, 4, 9, 13, 16, 17, 18, 29

Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387 (5th Cir. 1998) 8, 32

Wyatt v. Cole, 504 U.S. 158 (1992) 19

ADMINISTRATIVE DECISIONS

In re American Tobacco Co., 119 F.T.C. 3 (1995) 48

In re Beatrice Foods Co., 86 F.T.C. 1 (ALJ decision 1973, adopted as supplemented and modified by full Commission 1975) 46

In re Berger, 56 F.T.C. 1000 (ALJ decision, adopted as modified by full Commission 1960) 46

In re Chrysler Corp., 87 F.T.C. 719 (ALJ decision 1975, adopted as modified by full Commission 1976) 46

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In re Telebrands Corp., et al., Docket No. 9313, 2004 FTC LEXIS 154 (ALJ decision, Sept. 15, 2004).....46

In re Trans Union Corp., 118 F.T.C. 821 (ALJ decision 1993, affirmed as modified by full Commission 1994).....46

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. Art. VI, § 2 (Supremacy Clause) 31

Act of Feb. 4, 1815, ch. 31, 3 Stat. 195 (Customs Act) 3, 4, 15, 23

§ 5, 3 Stat. 197 ..... 3, 15

§ 6, 3 Stat. 197 ..... 3, 15

§ 8, 3 Stat. 198 3

Act of Mar. 2, 1833, ch. 57, 4 Stat. 632 (Force Act) 3, 4, 15, 17, 23

§ 3, 4 Stat. 633-34 4

Act of Mar. 8, 1863, ch. 81, § 5, 12 Stat. 755, 756 4

Act of June 30, 1864, ch. 173, § 50, 13 Stat. 223, 241 4

Act of July 13, 1866, ch. 184, 14 Stat. 98 (Revenue Act) 4, 15, 23

§ 67, 14 Stat. 171 4

Act of Mar. 3, 1875, ch. 130, § 8, 18 Stat. 371, 401 4

Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850 5

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.* 35, 43

7 U.S.C. § 136a 43

Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq.* 34

Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 35

Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* 4, 37

15 U.S.C. § 45(a)(1)-(2) 5

15 U.S.C. § 45(m)(1)(B) (1988) 44

15 U.S.C. § 45(m)(1)(B) 45

15 U.S.C. § 57a(a)(1)(B) 5, 39

Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 13, 108 Stat. 1691, 1696-97 37

Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 47

Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.* 43

15 U.S.C. § 2601(b)(1) 43

Judicial Code § 33 (1916) 21

Rev. Stat. § 643 (1874) 19, 25, 32

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1257 32

28 U.S.C. § 1292(b) 8

28 U.S.C. § 1442(a) 2, 18

28 U.S.C. § 1442(a)(1) 1, 2, 4, 7, 8, 9, 11, 12, 13, 14, 15, 22, 27, 28, 29, 30, 32, 33, 34, 37, 38, 42

28 U.S.C. § 1443(2) 22, 23

42 U.S.C. § 1983 ..... 13, 24

Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §§ 4-88-101 *et seq.* 7

10 C.F.R.:

Pt. 430:

§ 430.23 44

Subpt. B, Apps A1-Z 44

16 C.F.R.:

Pts. 17-901 39

Pt. 408 40

40 C.F.R.:

Pt. 86, Subpt. N 43

Pt. 92, Subpt. B 43

Pt. 1065 43

LEGISLATIVE MATERIALS

H.R. Rep. No. 64-776 (1916) 4

H.R. Rep. No. 80-308 (1947) 4, 33

H.R. Rep. No. 103-138 (1993) 45

ADMINISTRATIVE MATERIALS

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INTRODUCTION

For nearly two centuries, the federal officer removal statute has provided federal officers, and those aiding or assisting them in enforcing federal law, a statutory right to remove state-law actions to federal court. The statute has fulfilled a narrow, yet important, role. It gives federal officers, and those acting with them, a right to a federal forum as a safeguard against state judicial actions that, especially during times of discord between States and the federal government, could interfere with the enforcement and operation of national laws. *See Tennessee v. Davis*, 100 U.S. 257, 262-63 (1880); *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). The federal officer removal statute protected customs officers enforcing the embargo against England during the War of 1812, federal revenue officers enforcing the "Tariff of Abominations" during the nullification crisis of 1833, and federal revenue officers enforcing the Nation's prohibition laws in the 1920s.

This case began as a class action brought in state court under Arkansas law based on Philip Morris's fraudulent marketing and sale of so-called "light" cigarettes. Notwithstanding the well-defined history and narrow purposes of the federal officer removal statute, Philip Morris — a private commercial actor — invoked the statute to remove the case to federal court. The thrust of Philip Morris's removal claim was that the Federal Trade Commission's ("FTC's") supposedly extensive regulation of Philip Morris's light cigarettes has rendered Philip Morris a party "acting under" a federal officer within the meaning of 28 U.S.C. § 1442(a)(1). Indeed, Philip Morris insisted that this "is exactly the type of case for which the federal officer removal statute was created." Appellee's Br. 34. The Eighth Circuit agreed with Philip Morris's deeply flawed interpretation of the statute in a holding that is at odds with the text, history, and purposes of the statute and the FTC's actions. This Court should reverse.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-19a) is reported at 420 F.3d 852. The district court's opinion denying petitioners' motion to remand (Pet. App. 20a-60a) is unreported (but available at 2003 WL 23272484).

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2005. A petition for rehearing was denied on November 18, 2005. *See* Pet. App. 61a. On February 9, 2006, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 20, 2006, and on March 14, 2006, he further extended the time within which to file a petition to and including April 17, 2006. *See id.* at 100a-101a. The petition for a writ of certiorari was filed on April 7, 2006, and was granted on January 12, 2007 (127 S. Ct. 1055). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutes are set forth at App., *infra*, 1a-2a.

STATEMENT OF THE CASE

1. The federal officer removal statute, 28 U.S.C. § 1442(a), governs the removal from state court to federal court of criminal and civil actions in which federal officers and agencies are defendants. The statute provides for removal when "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof" is "sued in an official or individual capacity for any act under color of such office." *Id.* § 1442(a)(1). In permitting federal officers to remove civil actions brought under state law, § 1442(a)(1) functions as "an exception to the 'well-pleaded complaint' rule, under which (absent diversity) a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2155 n.12 (2006) (internal quotation marks

omitted); *see generally Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

Although the federal officer removal statute's long history has been recounted by this Court, *see Willingham v. Morgan*, 395 U.S. 402, 405 (1969), a brief recitation nonetheless helps to place this case in historical context. Congress enacted the "primordial officer removal statute" as part of the Customs Act of 1815. *City of Greenwood v. Peacock*, 384 U.S. 808, 820 n.17 (1966). The removal provision "was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular," and was intended "to protect federal officers from interference by hostile state courts." *Willingham*, 395 U.S. at 405; *see also* William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 Am. J. Legal Hist. 333, 337 (1969) (during the War of 1812, "New England shipowners harassed federal customs officers by vexatious lawsuits," which prompted the Customs Act of 1815).

The Act provided that a customs collector, in enforcing the embargo, could "employ within his district such number of proper persons, as inspectors of the customs, as he . . . judge[d] necessary." Act of Feb. 4, 1815, ch. 31, § 5, 3 Stat. 195, 197. Moreover, the customs collector, "when proceeding to make any search or seizure authorized by [the Act]," was "empowered to command any person . . . within ten miles of the place where such search or seizure shall be made, to aid and assist such officer in the discharge and performance of his duty therein." *Id.* § 6, 3 Stat. 197. The statute provided a right of removal to both the customs collector and "any other person aiding or assisting" the collector in enforcing the embargo. *Id.* § 8, 3 Stat. 198. This original removal provision expired at the end of the war. *See Willingham*, 395 U.S. at 405.

Congress enacted the next iteration of a federal officer removal statute in the Force Act of 1833, which was passed "in consequence of an attempt by [South Carolina] to make penal the collection by United States officers

within [South Carolina] of duties under the tariff laws." *Tennessee v. Davis*, 100 U.S. 257, 268 (1880); *see* Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633-34. The Force Act carried forward the "other person" clause from the Customs Act of 1815, providing for removal "in any case . . . commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States." Force Act § 3, 4 Stat. 633.

Congress enacted a series of removal provisions during the Civil War. *See Willingham*, 395 U.S. at 405-06; *see also* Act of Mar. 8, 1863, ch. 81, § 5, 12 Stat. 755, 756; Act of June 30, 1864, ch. 173, § 50, 13 Stat. 223, 241. Of particular relevance, in enacting the Revenue Act of 1866, Congress adopted a removal statute using the "acting under" clause found in the current statute. *See* Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171.

Congress amended the statute several times prior to 1948,[1] at which time it was amended, as a part of the Judicial Code of 1948, to include all federal officers. *See Willingham*, 395 U.S. at 406. The House Committee Report accompanying the 1948 revision explained that the revised section was "extended to apply to all officers and employees of the United States or any agency thereof." H.R. Rep. No. 80-308, at A134 (1947).

Finally, in 1996, Congress responded to this Court's decision in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), by amending § 1442(a)(1) to include federal agen-

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[1] Congress extended the statute in 1875 to provide a right of removal for an officer of Congress in "the discharge of his official duty, in executing any order of [either House of Congress]." Act of Mar. 3, 1875, ch. 130, § 8, 18 Stat. 371, 401. The statute was amended in 1916 to give a right of removal to "any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer." H.R. Rep. No. 64-776, at 1 (1916).

cies. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850.

2. The Federal Trade Commission Act ("FTC Act") prohibits "unfair or deceptive acts or practices in or affecting commerce," directs the FTC to prevent persons from engaging in such acts or practices, and authorizes the FTC to prescribe rules to "define with specificity acts or practices which are unfair or deceptive." 15 U.S.C. §§ 45(a)(1)-(2), 57a(a)(1)(B). Although its law-enforcement and rulemaking authority extends to the marketing and sale of tobacco products, the FTC has never prescribed regulations governing the tobacco industry.

In the 1950s, the FTC began investigating inaccuracies in cigarette advertising about tar and nicotine. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). That inquiry was triggered by the industry's new advertising emphasis: "In response to the emerging scientific evidence that cigarette smoking posed a significant health risk to the user, . . . major cigarette manufacturers began widespread promotion of filtered cigarettes to reassure smokers" about the health effects of smoking. National Inst. of Health, *The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes*, at iii (Aug. 1996) (JA 66).

By the mid-1960s, "the FTC became concerned about the absence of a standard method for testing cigarette delivery of tar and nicotine." *Brown & Williamson*, 778 F.2d at 37. In 1966, the FTC issued a policy statement explaining that a cigarette maker's factual statements regarding tar and nicotine content, if based on the "Cambridge Filter Method," would not be deemed deceptive so long as there were no express or implied representations that the levels of tar and nicotine reduced or eliminated health hazards. *See* News Release, Federal Trade Commission (Mar. 25, 1966) (JA 20-21).

The Cambridge Filter Method "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' dura-

tion on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length." *Brown & Williamson*, 778 F.2d at 37. The method is intended to "provide[] an objective basis for assessing the relative amounts of tar and nicotine different cigarettes will deliver when they are smoked in the same way." *Id.* In 1967, the FTC opened a cigarette testing laboratory using the Cambridge Filter Method. *See* Notice, *Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (1967).[2]

In 1970, the FTC sought comment on a formal Trade Regulation Rule that would have made it "an unfair or deceptive act or practice . . . to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content [of cigarettes]" based on the Cambridge Filter Method. Notice of Proposed Rulemaking, *Advertising of Cigarettes*, 35 Fed. Reg. 12,671, 12,671 (1970). Later that year, five leading cigarette companies, including Philip Morris, voluntarily undertook — in an industry agreement to which the FTC was not a party — to disclose in their advertising tar and nicotine data culled from FTC test results. *See* Federal Trade Commission, *Report to Congress*, App. C (Dec. 31, 1970). The FTC subsequently suspended its rulemaking. *See Brown & Williamson*, 778 F.2d at 37.

3. Petitioners Lisa Watson and Loretta Lawson brought this civil action against Philip Morris in Arkansas state court for violations of Arkansas law. On behalf of a class of all persons who purchased two brands of light cigarettes — Marlboro Lights and Cambridge Lights — petitioners allege that Philip Morris engaged in unfair and deceptive consumer practices in connection with the marketing and sale of its light cigarettes.

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[2] Since 1987, when the FTC closed the laboratory, most testing of tar and nicotine levels has been conducted by a private laboratory funded by tobacco companies. *See* Notice, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48,158, 48,158 n.5 (1997).

Petitioners allege that Philip Morris, "[w]hile marketing and promoting decreased tar and nicotine deliveries, . . . designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the [Cambridge Filter Method] . . . than would be delivered to the consumers of the product." Pet. App. 63a-64a (¶ 9). Petitioners also allege that Philip Morris falsely represented its cigarettes as light or low tar by, among other things, "[d]escribing [its] product as light when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette design and composition," "[i]ntentionally manipulating the design and content" of its cigarettes to lower artificially the results of the testing method used to measure tar and nicotine levels, and "[e]mploying techniques that . . . actually increas[e] the harmful biological effects" caused by tar in cigarettes. *Id.* at 64a-65a (¶¶ 12-13). Petitioners seek relief under the Arkansas Deceptive Trade Practices Act (Counts I and II). *See* Ark. Code Ann. §§ 4-88-101 *et seq.*

Philip Morris removed the action to federal court, invoking the federal officer removal statute. Philip Morris argued that removal by a "private party [is appropriate] where it is sued for actions taken under the direction of a federal officer." Pet. App. 76a. It maintained that "[t]he 60-year history of FTC mandates" caused it to be a person "acting under" a federal officer. *Id.* at 88a.

In their motion to remand to state court, petitioners argued that their claims challenged not the FTC's testing procedures "but rather the company's deceptive practices in labeling its products as low tar and nicotine . . . accomplished by manipulation of the [FTC] testing procedures." Appellants' Br. xii (citing Motion for Remand ¶¶ 4-5). Petitioners further contended that Philip Morris's marketing of light cigarettes, even if subject to FTC regulation, did not make the company a person "acting under" a federal officer for purposes of the removal statute. *Id.*

The district court denied petitioners' motion to remand. The court held that "Philip Morris acted under the direc-

tion of a federal officer within the meaning of § 1442(a)(1) when it cited the tar and nicotine values derived from the FTC Method in its [cigarette] advertisements," because FTC "regulation of cigarette testing and advertising spans over forty years and is detailed and specific." Pet. App. 41a. Recognizing that the removal issue had divided the federal courts, the court certified the question for interlocutory review under 28 U.S.C. § 1292(b). *See id.* at 57a-60a.

4. The Eighth Circuit affirmed. The court first stated that it was obliged not to give § 1442(a)(1) a "'narrow' or 'limited' interpretation." Pet. App. 4a. It then ruled that whether the "acting under" clause is satisfied depends on the "detail and specificity of the federal direction of the defendant's activities." *Id.* at 6a. Relying by analogy on the Fifth Circuit's decision in *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 398 (5th Cir. 1998) — a case involving a government contractor — the Eighth Circuit held that the FTC subjected Philip Morris to "comprehensive, detailed regulation" and that Philip Morris therefore satisfied the "acting under" clause. Pet. App. 7a-8a.

The court found it irrelevant that the FTC "regulations" that Philip Morris claimed rendered it a federal officer were never adopted and that the industry acted by voluntary agreement. The court explained that "[t]he FTC effectively used its coercive power to cause the tobacco companies to enter the agreement." *Id.* at 10a.

The Eighth Circuit also found a causal connection between the challenged conduct of Philip Morris and the acts regulated by the FTC. The court held that, based largely on two consent orders entered into by the FTC and other tobacco companies, petitioners' complaint both "directly implicates the enforcement and wisdom of the FTC's tobacco policies" and "challenge[s] the FTC's policy judgment that despite the failure of the Cambridge Filter Method . . . the test results should still be included in advertising." *Id.* at 15a-16a.

In addition, the Eighth Circuit decided that, although petitioners' claims arose entirely under Arkansas law, Philip Morris had a colorable federal preemption defense that supported its claim to removal. *See id.* at 16a-18a.

SUMMARY OF ARGUMENT

I. Section 1442(a)(1) permits removal when a federal officer, "or any person acting under that officer," is "sued in an official or individual capacity for any act under color of such office." A private party "act[s] under" a federal officer by assisting the officer in carrying out the officer's official duties, not by simply complying with federal regulation. That interpretation is confirmed by the statute's "color of office" clause, which limits removal to cases in which the defendant is sued for acts taken in the exercise of official authority. A private commercial actor, even one subject to extensive federal regulation, cannot sensibly be said to act "under color of [federal] office."

The history and purposes of the federal officer removal statute likewise make clear that the statute does not apply to private regulated commercial actors. The statute was designed to protect federal officers from state-court civil or criminal actions that, because of the costs and burdens of litigation in remote locations and the risk of anti-federal prejudice, could hinder the *enforcement* of unpopular federal laws. *See Willingham v. Morgan*, 395 U.S. 402, 406 (1969). That purpose has no application to a private commercial actor sued for acts undertaken in *compliance* with federal law. A party that is the *object* of regulatory enforcement, such as Philip Morris, will not face hostility directed at those who *enforce* unpopular federal laws.

Further, "one of the most important reasons for [federal officer] removal is to have the validity of the defense of official immunity tried in a federal court." *Id.* at 407. That purpose has no application to private regulated commercial actors because they have no defense of qualified immunity for commercial acts undertaken in compliance with federal regulation.

Decisions of this Court confirm that the "acting under" clause is limited to those who aid or assist federal officers in performing official functions. *See Davis v. South Carolina*, 107 U.S. 597, 599-600 (1883); *Maryland v. Soper*, 270 U.S. 9, 30-32 (1926); *City of Greenwood v. Peacock*, 384 U.S. 808, 820 n.17, 823 n.20 (1966). Under that standard, a private commercial actor, such as Philip Morris, has no claim to federal officer removal, regardless of the comprehensiveness or detail of federal regulation.

II. The justifications given by the Eighth Circuit for its "comprehensive regulation" test are unsound. The court made no effort to ground its interpretation of "acting under" in the text, structure, or purposes of the statute. Instead, the court mistakenly read this Court's decisions as requiring it to give a broad interpretation to the "acting under" clause. Properly understood, the clause should be interpreted strictly, in keeping with the longstanding view that removal is an extraordinary procedure. *See Colorado v. Symes*, 286 U.S. 510, 518 (1932); *Screws v. United States*, 325 U.S. 91, 111-12 (1945) (plurality).

The Eighth Circuit's test would substantially, and unnecessarily, expand the removal jurisdiction of federal courts. Scores of private commercial actors face regulation at least as comprehensive and detailed as that experienced by Philip Morris. Under a comprehensive-regulation test, such actors could frequently invoke the removal jurisdiction of federal courts, thereby threatening the legitimate interests of States in having state-law actions adjudicated in state courts and unnecessarily stretching the federal judiciary's resources.

III. Even under the Eighth Circuit's test, or any standard that attaches weight to the comprehensiveness and detail of federal control, Philip Morris is not entitled to federal officer removal.

First, although the FTC has broad authority to adopt industry-wide trade rules, it has never adopted a *single* regulation pertaining to light cigarettes. The 1970 agreement by leading cigarette makers to disclose tar and

nicotine content in advertising was voluntary, and the FTC lacks any authority to enforce it. The FTC has thus never mandated the use of the Cambridge Filter Method, nor has it defined descriptors, such as "light" or "low tar," much less heavily regulated their use.

Second, and contrary to the Eighth Circuit's view, the FTC's history of cigarette testing does not represent an extraordinary level of federal regulation. Such product testing, whether by public or private actors, is a common feature of many regulatory regimes.

Third, the Eighth Circuit erred in according substantial weight to consent orders that the FTC entered into with *other* tobacco companies. The text and structure of the FTC Act, decisions of this Court, and the FTC's long-standing practice all make clear that FTC consent orders bind only the parties to the order and do not function as industry-wide regulations.

ARGUMENT

I. THE FEDERAL OFFICER REMOVAL STATUTE PROTECTS ONLY THOSE AIDING OR ASSISTING FEDERAL OFFICERS IN PERFORMING OFFICIAL DUTIES

The "acting under" clause of § 1442(a)(1) encompasses private actors only insofar as they are assisting federal officers in performing official duties. It does not protect private commercial actors complying with federal regulation, regardless of the level of regulatory control. That conclusion follows from the text, history, and purposes of the statute, as well as from decisions of this Court construing antecedents to § 1442(a)(1).

A. The Text Of The Federal Officer Removal Statute Shows That It Is Limited To Private Parties Assisting In Performing Official Duties

1. The statute provides that a state-court civil action or criminal prosecution may be removed to federal court by "[t]he United States or any agency thereof or any officer (or any person *acting under* that officer) of the United

States or of any agency thereof, sued in an official or individual capacity for any act *under color of such office*." 28 U.S.C. § 1442(a)(1) (emphases added).

As a straightforward textual matter, a private party "act[s] under" a federal officer within the meaning of § 1442(a)(1) when the party assists or acts on behalf of a federal officer in performing an official function. To "act under" means to act as a subordinate or agent of another, subject to the other's control or supervision in exercising the other's authority. *See Random House Unabridged Dictionary* 2059 (2d ed. 1993) (defining "under" as "subject to the authority, direction, or supervision of; *a bureau functioning under the prime minister*"); *Webster's Third New International Dictionary* 2487 (2002) (defining "under" as "subject to the bidding or authority of: led by <served [under] three colonels>").[3] A person cannot sensibly be said to "act under" a federal officer without exercising official authority in carrying out a governmental function.

The adjoining text bolsters that common-sense reading of "acting under." A person acting under a federal officer may remove an action only if sued in state court for an "act *under color of such office*." 28 U.S.C. § 1442(a)(1) (emphasis added). The "color of office" clause informs the meaning of the preceding "acting under" clause. *See Neal v. Clark*, 95 U.S. 704, 708 (1878) ("It is a familiar rule in the interpretation of . . . statutes that a passage will be

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[3] *Cf., e.g., Gnerich v. Rutter*, 265 U.S. 388, 391 (1924) (explaining that "agents or subordinates of the Commissioner of Internal Revenue" "act under" the Commissioner by being "responsible to him" and "abid[ing] by his direction" such that "[w]hat they do is as if done by him"); *Chicago Deposit Vault Co. v. McNulta*, 153 U.S. 554, 561 (1894) ("The receiver being an officer of the court, and *acting under* the court's direction and instructions, his powers are derived from and defined by the court under which he acts.") (emphasis added); *Beard v. Burts*, 95 U.S. 434, 437-38 (1877) ("[i]t is a legitimate presumption that agents who act for and on behalf of an army in the field are *acting under* the authority of its commander") (emphasis added).

best interpreted by reference to that which precedes and follows it.") (internal quotation marks omitted).

This Court has held that the "color of office" clause requires "a causal connection between the charged conduct and asserted *official authority*." *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (internal quotation marks omitted, emphasis added). Similarly, in *Willingham v. Morgan*, 395 U.S. 402 (1969), this Court said that the clause "cover[s] all cases where federal officers can raise a colorable defense *arising out of their duty to enforce federal law*." *Id.* at 406-07 (emphasis added). Those cases suggest that removal is appropriate only in those circumstances involving the exercise of federal authority or the enforcement of federal law. The "color of office" clause, in that way, evinces Congress's expectation that a removing party — whether a federal officer or one "acting under" a federal officer — will have some claim to have been acting in an official capacity in carrying out public functions.

The "color of law" requirement of 42 U.S.C. § 1983 underscores that point. In *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), this Court held that "the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct." *Id.* at 50 (internal quotation marks omitted). To act under "color of law" requires that a private party have "exercis[ed] power 'possessed by virtue of . . . law and made possible only because the [party] is clothed with the authority of . . . law.'" *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Although those decisions do not directly construe § 1442(a)(1), a plurality of this Court has said that the "color of office" requirement is *stricter* than the "color of law" requirement of § 1983. *See Screws v. United States*, 325 U.S. 91, 111-12 (1945) (plurality).

Those "color of law" decisions show why a private party like Philip Morris cannot reasonably be said to "act under" a federal officer or to operate "under color of [federal] office" merely by engaging in commercial conduct subject

to federal regulation: When a private party complies with regulation, it neither exercises authority vested in it by law nor is clothed with governmental authority. Were it otherwise, Philip Morris, in marketing and selling light cigarettes, would be subject to the constitutional restraints applicable to state actors. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) ("governmental authority may dominate an activity to such an extent that its participants must . . . be subject to constitutional constraints"). Philip Morris itself has argued that federal regulation does not render it a state actor, and the Third Circuit has agreed, holding that, notwithstanding "federal[] regulat[ion]" of cigarettes, Philip Morris is a private commercial actor, not a federal agent, engaged in "a private rather than public . . . function." *Brown v. Philip Morris Inc.*, 250 F.3d 789, 802 (3d Cir. 2001).[4]

For these reasons, private parties "acting under" federal officers are those exercising or clothed with governmental authority by virtue of aiding or assisting federal officers in the performance of official duties.

2. The statutory lineage of the current "acting under" clause in § 1442(a)(1) makes clear that those "acting under" a federal officer are those who aid or assist federal officers. The "acting under" formulation, which Congress first used in 1866, "obviously drew on the comparable characterization of the 'other person' in the Customs Act of 1815." *City of Greenwood v. Peacock*, 384 U.S. 808, 823 n.20 (1966); *see Findley v. Satterfield*, 9 F. Cas. 67, 68 (C.C.N.D. Ga. 1877) (No. 4792) (noting the statutory asso-

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[4] This Court's state-actor precedents confirm that a private regulated party has no claim to be acting under the authority of a federal officer. Under settled principles, "extensive and detailed" regulation of a private actor does not "convert [the private actor's] action into that of the State for the purposes of the Fourteenth Amendment." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *see also Sullivan*, 526 U.S. at 52 (Court has "consistently held" "[i]n cases involving extensive state regulation of private activity" that regulation does not render private entity state actor); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("extensively regulated" nursing home was not state actor).

ciation among the Customs Act of 1815, the Force Act of 1833, and the Revenue Act of 1866); Wiecek, 13 Am. J. Legal Hist. at 337 (noting that the "1815 [Customs] Act set an important precedent for subsequent removal legislation"); *see also Sutherland on Statutory Construction* § 51.02, at 121 (5th ed. 1992) ("It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter.")

The "other person" in the Customs Act of 1815, in turn, clearly referred to "inspectors of the customs" who were *employed* by the customs collector, § 5, 3 Stat. 197, and private persons who "*aid[ed]* and *assist[ed]*" the customs collector "in the discharge and performance of his duty," *id.* § 6, 3 Stat. 197 (emphases added). As a straightforward textual matter, then, a party qualified as an "other person" under the Customs Act of 1815 or as one "acting under" a federal officer in the Revenue Act of 1866 when he or she aided or assisted or acted as an employee of a federal officer. Nothing in Congress's use of the "other person" or "acting under" clause ever suggested an intent to afford a right of removal to private commercial actors who were merely complying with (rather than assisting a federal officer in enforcing) federal law.

Furthermore, no evidence, textual or otherwise, suggests that Congress intended, in enacting any of the subsequent versions of the statute since 1866, to sever the equivalence between the class of actors qualifying as "acting under" a federal officer and the class of actors fitting within the category of "other person" in the Customs Act of 1815. *See* Stanley I. Kutler, *Judicial Power and Reconstruction Politics* 145-46 (1968). Section 1442(a)(1) — which has the same "acting under" language as the 1866 Act — must therefore be construed in keeping with that settled historical meaning. *Cf. Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 541-42 (1954) (holding that subsequent statute authorized President to enforce wage stabilization requirement based on similar provision of prior statute, on ground that "[t]o read the [subsequent

statute] without reference to th[e] model [of the prior statute] is to read it out of the context in which Congress enacted it").[5]

B. The History And Purposes Of The Federal Officer Removal Statute Confirm That The "Acting Under" Clause Applies Only To Those Who Aid And Assist Federal Officers

The history and purposes of the statute confirm that the federal officer removal statute is properly limited to private parties assisting federal officers in performing official functions, and demonstrate why removal is not available to private regulated parties solely because of their compliance with federal law. *See, e.g., Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (statutory interpretation must take account of "'the objects and policy of the law'") (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)). This Court has frequently looked to the history and purposes of the statute when ascertaining its scope. *See, e.g., Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981); *Willingham*, 395 U.S. at 405-06; *Gay v. Ruff*, 292 U.S. 25, 32-33 (1934); *Colorado v. Symes*, 286 U.S. 510, 517-19 (1932).

1. The primary purpose of the federal officer removal statute, this Court has held, "is not hard to discern." *Willingham*, 395 U.S. at 406. The statute rests on the premise that "the Federal Government 'can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, . . . the operations of the general government may at any time be arrested at the will of one of

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[5] Indeed, that is precisely the approach this Court took in construing the federal civil rights removal statute in *Peacock*, even though the version of the removal statute at issue there lacked *any* textual limitation — that is, "federal officer," "acting under," or "other person" — on the universe of parties that could remove. *See Peacock*, 384 U.S. at 814-15 (holding that current version of the statute must be read in light of the statutory "history" of the removal statute).

its members.'" *Id.* (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)).[6] The purpose of the statute, in other words, is to provide a federal judicial forum for federal officers, as well as those aiding or assisting them, for acts undertaken in enforcing federal law and in that way "to safeguard the exercise of legitimate federal authority." *Manypenny*, 451 U.S. at 241 n.16.

That purpose reflects Congress's concern that state judicial proceedings might be used, in periods of national stress, to hinder federal officers in their enforcement of unpopular federal laws. *See id.* at 241-42 ("The act of removal permits a trial upon the merits of the state-law question free from local interests or prejudice."); *Ruff*, 292 U.S. at 32 (Force Act removal provision was designed to quell South Carolina's threat of nullification by "protect[ing] those engaged in the enforcement of the federal revenue law from attack by means of prosecutions and suits in a state court for violation of state law"). In that way, the federal officer removal statute reflects the "interest in protecting federal officials from possible local prejudice." *Clinton v. Jones*, 520 U.S. 681, 691 (1997).

That purpose has no application to a private regulated commercial actor. First, *Tennessee v. Davis* points to a very practical concern that those exercising federal authority will be haled into state courts in retaliation for the enforcement of unpopular laws and that, "during the pendency of the prosecution," "the officer [will be] withdrawn from the discharge of his duty." 100 U.S. at 263. Because a private regulated party sued for conduct undertaken while acting in compliance with federal regulation is not exercising or assisting in the exercise of the authority of the federal government, a suit against that party

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[6] *See also Willingham*, 395 U.S. at 406 (removal statute rests on "very basic interest in the enforcement of federal law through federal officials"); *Symes*, 286 U.S. at 517 (prior statutes were enacted to "safeguard[] officers and others acting under federal authority against peril of punishment for violation of state law . . . by reason of opposing policy on the part of those exerting or controlling state power").

will not similarly impair federal law enforcement. *Cf. Findley*, 9 F. Cas. at 68 ("prompt and effective collection of the revenue" could be "seriously impeded" when "local sentiment, adverse to a particular revenue law, . . . exert[ed] itself in irremovable prosecutions in the local courts against persons executing that [revenue] law").

Second, a party that is the *object* of regulatory enforcement efforts will not face hostility directed against those who *enforce* federal law. Put in historical terms, shippers transporting goods in compliance with the embargo during the War of 1812 did not face harassment by New England States opposed to the embargo; that animosity was reserved for persons *enforcing* the embargo. Accordingly, Congress provided a statutory right to a federal forum, free from regional prejudices, for federal customs officers and those aiding and assisting them. *See Willingham*, 395 U.S. at 405; *see also* Wiecek, 13 Am. J. Legal Hist. at 337. Affording a right of removal to private regulated parties, as does the Eighth Circuit's test, turns the historical rationale on its head by providing a basis for removal to a class of defendants that is the *object* of federal enforcement efforts.

2. In addition to safeguarding those who enforce federal law, "one of the most important reasons for [federal officer] removal is to have the validity of the defense of official immunity tried in a federal court." *Willingham*, 395 U.S. at 407; *see also International Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 86-87 (1991) (federal officers need protection of a federal forum "because of the manipulable complexities involved in determining [federal officers'] immunity"); *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841-42 (1989) (per curiam) (citing § 1442(a) as an instance in which "Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities"); *Acker*, 527 U.S. at 447 (Scalia, J., concurring in part and dissenting in part) ("the main point" of federal officer removal statute "is to

give officers a federal forum in which to litigate the merits of immunity defenses").

That purpose, too, weighs against including private commercial actors within the ambit of the "acting under" clause. Because Philip Morris is a private entity doing nothing more than complying with federal regulation, it has not asserted — and could not assert — an official immunity defense. This Court has said that "qualified immunity . . . acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Wyatt v. Cole*, 504 U.S. 158, 168 (1992). Private actors — who "hold no office requiring them to exercise discretion" and are not "principally concerned with enhancing the public good" — are not entitled to the defense of qualified immunity. *Id.*; *see also Richardson v. McKnight*, 521 U.S. 399, 404-10 (1997) (privately employed prison guards of for-profit corporation running state correctional center were not entitled to qualified immunity because "[h]istory does not reveal a 'firmly rooted' tradition of immunity" for prison guards and immunity would not serve the purposes of the doctrine) (emphasis omitted). Because a private regulated commercial actor cannot satisfy the requisites of qualified immunity, it makes no sense in light of the statutory purposes to provide such an actor with a right to federal officer removal.

C. This Court's Decisions Establish That The "Acting Under" Clause Protects Only Those Assisting In Performing Official Functions

1. In *Davis v. South Carolina*, 107 U.S. 597 (1883), this Court held that a U.S. army corporal was "acting under" a United States Deputy Marshal in the arrest of a distiller for violating the revenue laws. *See id.* at 597-98. The distiller was killed as he sought to escape, and Corporal Davis was indicted for murder in a South Carolina state court. Davis removed the case to federal court under § 643 of the Revised Statutes, which afforded a right of removal to "any officer appointed under or acting by au-

thority of any revenue law . . . or any person acting under or by authority of such officer."

This Court first rejected South Carolina's argument that the statute did not "extend[] to embrace the case of United States marshals" because a marshal is not "appointed under or acting by authority of any revenue law." *Id.* at 599-600. The marshal, "when engaged officially in lawful attempts to enforce a revenue law, by the arrest of persons accused of offenses against it, . . . is an officer acting under the authority of that law; for it is that law under which is issued the process, which constitutes his authority for his official action." *Id.* at 600.

With respect to Davis, who was neither a revenue officer nor a marshal, the Court explained that "the protection which the [removal statute] . . . furnishes to the marshal and his deputy[] also shields all who *lawfully assist him in the performance of his official duty*." *Id.* (emphasis added). Under that standard, the Court held that Davis, because he was "detailed as a guard in aid of the marshal," was entitled to remove the case to federal court. *Id.*

Davis v. South Carolina points to two propositions that bear decisively on this case. First, the "acting under" clause — far from entitling a wide range of *private* parties to invoke the federal officer removal statute — was intended originally to benefit primarily federal officials other than customs or revenue officers who were nonetheless involved in the enforcement of the revenue laws. *See, e.g.*, *Black's Dillon on Removal of Causes* § 43, at 58 (1898) ("United States marshals are not officers appointed under the revenue laws," and therefore "[i]t is only when they are acting in their official character, in the enforcement of the revenue laws or the election laws, that suits or prosecutions against them come within the terms" of the removal statute). Second, to the extent that the "acting under" clause extends to parties other than revenue and customs officers, those parties must be "assist[ing]" in the "performance of [an] official duty." 107 U.S. at 600.

2. This Court confronted whether a private party could invoke the federal revenue officer removal statute in *Maryland v. Soper*, 270 U.S. 9 (1926). There, four prohibition agents and an employee — their chauffeur — were indicted for murder in state court. *See id.* at 21-22. The defendants removed under the federal revenue officer removal statute, then § 33 of the Judicial Code. The defendants argued that they were acting in "discharge of their official duties as prohibition agents, and as officers of the internal revenue in the discharge of their duty." *Id.* at 22. The chauffeur, who was not a federal officer, maintained that he "was assisting [the officers] and was acting under the authority of the prohibition director." *Id.*; *see also id.* (characterizing the chauffeur as a "helper").

This Court held that removal was improper.[7] Before reaching that conclusion, however, the Court observed that the chauffeur, as a "helper to the four officers under their orders and by direction of the prohibition director for the state," "has the same right to the benefit of [the federal revenue officer removal statute] as [the prohibition officers]." *Id.* at 30; *see also Manypenny*, 451 U.S. at 253 n.5 (Brennan, J. dissenting) (noting the chauffeur in *Soper* "was assisting the four agents under the authority of the Prohibition Director"). That was consistent with this Court's understanding of the removal provision's purpose: Congress "assumed that the enforcement of the National Prohibition Act was likely to encounter in some quarters a lack of sympathy and even obstruction, and sought by making section 33 applicable to defeat the use of local courts to embarrass those who must execute it." *Soper*, 270 U.S. at 32.

Soper is in keeping with the Court's holding in *Davis v. South Carolina* that the "acting under" clause extends to those assisting federal officers in performing official func-

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[7] The Court concluded that the defendants had not "establish[ed] fully and fairly" their immunity defense and therefore had not justified "so exceptional a procedure" as removal. 270 U.S. at 34-35.

tions. Because Congress enacted § 1442(a)(1) against that settled judicial understanding, that interpretation of the "acting under" clause should control here. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When . . . judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well."); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (same).

3. The foregoing federal officer removal cases culminated most recently in this Court's decision in *City of Greenwood v. Peacock*, which establishes that the "acting under" clause extends *only* to those private actors affirmatively assisting federal officers in carrying out official government functions. *See* 384 U.S. at 815-16.

Peacock involved the prosecution on various state criminal charges of persons engaged in civil rights activity in Mississippi. *See id.* at 810. The defendants removed to federal court under the civil rights removal statute, which in relevant part allows removal of a civil action or criminal prosecution for "any act under color of authority derived from any law providing for equal rights." 28 U.S.C. § 1443(2). This Court rejected the defendants' claim to removal, holding that § 1443(2) "is available only to federal officers and to persons assisting such officers in the performance of their official duties." 384 U.S. at 815.

In reaching that conclusion, this Court relied on the history of the civil rights *and* federal officer removal statutes. The Court noted that the "progenitor of § 1443(2) was § 3 of the Civil Rights Act of 1866," which allowed removal of state-court actions against "any officer . . . or other person" for conduct in furtherance of the Act. *Id.* The Court explained that the "other person" clause in the 1866 statute was limited to those private persons assisting in enforcing federal law, a limitation that Congress intended to carry forward in § 1443(2).

Limiting § 1443(2) to "official enforcement activity under federal equal civil rights laws," the Court stated,

"draws support from the analogous provisions in the removal statutes available to federal revenue officers." *Id.* at 820 n.17. Prior to 1866, federal officer removal statutes — that is, the Customs Act of 1815 and the Force Act of 1833 — "characteristically used the 'officer . . . or other person' formula in defining those entitled to the benefit of removal." *Id.* (ellipsis in original). The Customs Act, the Court said, "described the 'other person' as one 'aiding or assisting' the revenue officer." *Id.* Although the Revenue Act of 1866 "characterized the 'other person' as one 'acting under or by authority of any [revenue] officer,'" that description "obviously drew on the comparable characterization of the 'other person' in the Customs Act of 1815." *Id.* at 823 n.20 (alteration in original).

In short, this Court held that the civil rights removal statute contained an implicit "acting under" limitation, *see id.* at 823-24, which mirrored the "acting under" clause of the federal officer removal statute, *see id.* at 823 n.20. Based on those principles, the Court concluded that § 1443(2) authorized removal by private parties only if they were "authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law." *Id.* at 824.

D. A Private Party Complying With Federal Regulatory Requirements Is Not Thereby "Assisting" A Federal Officer In Enforcing Federal Law

As we have shown, the "acting under" clause is properly limited to those aiding or assisting a federal officer in performing an official function. That standard provides no basis for removal by a private commercial actor by reason of its compliance with federal law, no matter how comprehensive or detailed the federal regulation.

First, a private commercial actor conforms its conduct to federal regulation by acting in the marketplace in adherence to federal law, but that does not mean its conduct is undertaken on behalf of the federal government. *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972)

("'pervasive' . . . regulation of private clubs" does not "make the State in any realistic sense a partner or even a joint venturer in the club's enterprise"); *Sullivan*, 526 U.S. at 52 ("Action taken by private entities with the mere approval or acquiescence of the State is not state action."). Although compliance with federal regulation may be said, broadly speaking, to advance the public interest and promote the goals of the regulating officials, regulatory compliance does not make a private actor one who assists a federal officer within the meaning of the statute. That concept of assistance is manifestly inconsistent with the historical rationales for removal, because it would afford a right of removal to those who are the *objects* of, rather than those who *participate and assist* in, law enforcement. *See supra* pp. 17-18; *see also Ruff*, 292 U.S. at 39 (railroad receiver, although "an officer of the court operating the railroad pursuant to the order appointing him," was not entitled to removal because he was not "an officer engaged in enforcing an order of a court").

Second, the importance of the distinction between compliance and assistance follows from this Court's § 1983 and state-actor cases. In *Polk County v. Dodson*, this Court held that a public defender, although an employee of the State, was not acting under color of law in representing an indigent defendant in a state criminal proceeding. *See* 454 U.S. at 317-18. The Court found that the "assignment [as a public defender] entailed functions and obligations in no way dependent on state authority." *Id.* at 318. Moreover, there was no basis for attributing the conduct of the public defender to the State: "[i]n our system a defense lawyer characteristically opposes the designated representatives of the State" and "best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Id.* at 318-19. Given the "adversarial functions" of a public defender vis-à-vis the State, this Court found it "peculiarly difficult to detect any color of state law" in the conduct of the public defender. *Id.* at 320. In

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001), this Court construed *Dodson* as reflecting the common-sense principle that "[t]he state-action doctrine does not convert opponents into virtual agents." *Id.* at 303-04.

That principle applies equally here. A business enterprise's primary — if not exclusive — interest is to "operate[] its business in furtherance of its own goals," not the public good. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 403 (1978); *cf.* Adam Smith, *The Wealth of Nations* 23-24 (Edward Cannan ed., Bantam Classics 2003) (1776) ("It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."). When those private ends threaten the public good, regulation is often used to temper the conflict. The interests of a private commercial actor and a regulating agency are therefore characteristically, if not inevitably, antagonistic. Just as in *Dodson* — where the public defender was an employee of the State — it would make no sense to view a private regulated commercial actor as acting on behalf of or aiding or assisting a regulatory agency in the performance of its regulatory duties.

Third, decisions of lower federal courts prior to Congress's adoption of the current version of the statute in 1948 show that private regulated parties have no claim to removal. *Johnson v. Wells, Fargo & Co.*, 98 F. 3 (C.C.N.D. Cal. 1899) (No. 12739), for example, involved "the alleged neglect of [Wells Fargo], as a common carrier, to receive and transport a certain package of photographs offered and tendered by plaintiff for conveyance and transportation." *Id.* at 4. Wells Fargo removed to federal court under § 643 of the Revised Statutes. Like Philip Morris here, Wells Fargo argued that, in refusing conveyance of the plaintiff's package, it was complying with a statute requiring all persons wishing to ship goods to have a revenue stamp. *Id.* at 5-6. Wells Fargo claimed to be "a person acting under the authority of a revenue law" because

the "suit [was] prosecuted . . . on account of the right and authority claimed by it under such law to require the plaintiff to furnish or pay" for the stamp. *Id.* at 7.

The court rejected that theory, explaining that "[t]he purpose of the statute [was] to protect the revenue officers of the government in the line of their official duties, and those who are employed to act under them in the performance of such duties." *Id.* at 8. The court held that, "further than providing this necessary protection to the administration of its revenues, the federal government has no interest in the business affairs of the people incidentally brought within the range of the tariff system." *Id.*[8]

That decision shows that the "acting under" clause has historically been available to private actors only insofar as they assist in the performance of official functions and that private commercial actors do not satisfy that standard. Congress's enactment of the current version of the statute against that background suggests that it had no intent to disturb that settled judicial understanding. *See National Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004) (courts should "assume Congress legislated against [a] background of law, scholarship, and history when it enact[s]" a statute).

Fourth, there is no small irony in Philip Morris's position. The acts that it claims to have committed under federal regulatory compulsion are the very same acts that the United States alleges constituted a RICO conspiracy. In fact, the federal government has charged that Philip

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[8] *See also In re Shumpka*, 268 F. 686 (N.D.N.Y. 1920), which held that a defendant, indicted for violation of state liquor laws, was not acting under the Prohibition Commissioner in selling his products with a permit from the Commissioner. The statute's limited purpose, the court stated, was to permit removal "from state courts to the federal courts [of] civil actions or criminal prosecutions against [federal] officers in the performance of their official duties, and against persons assisting the officers in the performance of official acts under the revenue laws." *Id.* at 687.

Morris, and other conspirators, "did the exact opposite of what the Government and public health community called for" and "fraudulently exploited the FTC test method to target and benefit financially by deceiving smokers." Post-Trial Br. of the United States at 70-71, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Aug. 24, 2005); *see also* Respondent's Br. in Response to Br. for the United States as Amicus Curiae at 1 (U.S. filed Dec. 19, 2006) (noting "[t]he Department of Justice is currently involved in litigation against respondent, in which one of the central issues is the FTC's regulatory history with respect to low yield cigarettes"). That suit brings into sharp focus the importance of the distinction between parties that are objects of regulatory compliance and those that assist in enforcing regulatory compliance. It also underscores the incongruity of using the "acting under" clause to "convert opponents into virtual agents." *Brentwood*, 531 U.S. at 303-04.

Fifth, if compliance with federal regulation is sufficient to allow a private party to invoke the federal officer removal statute, then § 1442(a)(1) will become a vehicle for scores of regulated parties with plausible preemption defenses against state-law claims to remove to federal court. *See infra* Part II.D. There is no basis for inferring from Congress's decision to carry forward the "acting under" clause in successive versions of the statute that it intended to redefine so radically the balance of state and federal judicial authority. On the contrary, the natural inference is that Congress intended to preserve the clause's limited role in permitting removal only by federal officers or those assisting them in carrying out their official duties.[9]

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[9] *See, e.g.*, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (it is an "ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute") (internal quotation marks omitted); *United States v. Bass*, 404 U.S. 336, 349-50 (1971)

II. THE EIGHTH CIRCUIT'S COMPREHENSIVE-AND-DETAILED-CONTROL TEST DOES NOT COMPORT WITH THE STATUTORY TEXT OR PURPOSES

The rationales given by the Eighth Circuit for its interpretation of the "acting under" clause are unavailing.

A. The Eighth Circuit Erred In Construing The Statutory Text

1. The Eighth Circuit gave short shrift to the text of § 1442(a)(1). Instead, the court announced — with no consideration of the historical function of the "acting under" clause — that "[w]hether a defendant is 'acting under' the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." Pet. App. 6a.

That interpretation has no basis in the text or structure of the statute. Indeed, the only cases the Eighth Circuit cited on this point involve government contractors, *see infra* Part II.C, and the courts there did not meaningfully address the statutory text. As shown above, nothing in the text of the federal officer removal statute supports the proposition that whether a private party is "acting under" a federal officer depends on the comprehensiveness and detail of federal regulation. The proper inquiry is whether a private party is assisting a federal officer in carrying out an official function. *See, e.g.*, *Peacock*, 384 U.S. at 820 n.17, 823 n.20; *Soper*, 270 U.S. at 22, 30; *Davis v. South Carolina*, 107 U.S. at 600.

2. As a "pure jurisdictional statute," *Mesa v. California*, 489 U.S. 121, 136 (1989), § 1442(a)(1) should be

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("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"; "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision").

strictly construed, a corollary of the principle that federal courts are courts of limited jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). The Eighth Circuit, however, read this Court's decision in *Willingham* as requiring it to interpret the statute "broad[ly]" in deciding whether Philip Morris was "acting under" a federal officer. Pet. App. 4a-5a.

That reading of *Willingham* is substantially wide of the mark. In *Willingham*, this Court rejected the proposition that doubt as to whether a federal officer could claim official immunity rendered removal improper, explaining that, "[a]t the very least," the statute "is broad enough to cover all cases where *federal officers* can raise a *colorable defense* arising out of *their duty to enforce federal law*." 395 U.S. at 406-07 (emphases added). Properly construed, the upshot of *Willingham* is that courts should apply the federal officer removal statute generously in determining whether a federal officer has a colorable "defense of official immunity." *Id.* at 407. It does not follow from that proposition that the statute must be construed broadly in all respects. *Cf. Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (reciting "canon of unquestionable vitality . . . 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used'") (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)). Indeed, after *Willingham*, this Court made clear that § 1442(a)(1) should be broadly interpreted only "[i]n construing the colorable federal defense requirement." *Acker*, 527 U.S. at 431.

Other decisions of this Court support a strict construction of § 1442(a)(1). In *International Primate Protection League*, for example, the Court read the statute narrowly, rejecting the defendant agency's broad interpretation of "officer of the United States." 500 U.S. at 81-82.[10] Simi-

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[10] The Eighth Circuit mistakenly believed that Congress's subsequent amendment of § 1442(a)(1) to include federal agencies provided "further support for a broad interpretation of the federal officer removal statute." Pet. App. 6a. That Congress permitted federal agen-

larly, in *Mesa v. California*, a case that involved U.S. Postal Service employees, this Court held that federal officer removal requires the "averment of a federal defense," reasoning that "the present language of § 1442(a) cannot be broadened by fair construction to give it the meaning which the Government seeks." 489 U.S. at 132-35, 139. It would be peculiar to afford a broad interpretation to the "acting under" clause for the benefit of private commercial actors when this Court has declined to construe the statute broadly in cases involving actual federal officers and agencies.

International Primate Protection League and *Mesa* properly reflect the longstanding principle that, because the States are entitled "to make and enforce their own laws," a court may exercise federal officer removal jurisdiction only when Congress has made clear that it intended to "wrest[]" from the state courts "jurisdiction to try persons accused of violating [state] laws." *Symes*, 286 U.S. at 518 (emphasis added); *see also Screws*, 325 U.S. at 111-12 (plurality) (requirements for federal officer removal are "strict" because it is an "exceptional procedure which wrests from state courts the power to try offenses against their own laws") (internal quotation marks omitted).

B. The Eighth Circuit Misapprehended The History And Purposes Of The Federal Officer Removal Statute

The Eighth Circuit's understanding of the history of the federal officer removal statute is flawed. The court of appeals did recite this Court's account of the purposes of the statute, *see* Pet. App. 5a, but it made no effort to tie that analysis to its broad interpretation of the "acting under" clause. For the reasons set forth in Part I.B, *supra*, a construction of § 1442(a)(1) that provides a right of removal

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cies, like federal officers, to invoke the federal officer removal statute says nothing about whether the statute should be interpreted broadly in determining whether private regulated parties are "acting under" a federal agency or officer.

to a private regulated commercial actor cannot be reconciled with historical rationales for federal officer removal.

The Eighth Circuit nonetheless apparently believed that removal by Philip Morris here was consistent with the rationale of *Tennessee v. Davis* because, in its view, plaintiffs' state-law claims "directly implicate[] the enforcement and wisdom of the FTC's tobacco policies." Pet. App. 15a. That view, however, ascribes a historically unwarranted purpose to the removal statute and fundamentally confuses removal with preemption.

The defense of preemption, grounded in the Supremacy Clause, ensures that state law does not unduly threaten compliance by regulated parties with federal directives. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (reconciling, under preemption principles, various state-law claims with federal regulation of cigarettes). Imposing state-law liability on regulated entities is preempted when "it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (internal quotation marks and citation omitted); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 875-84 (2000).

A private regulated commercial actor's colorable preemption defense, however, has never warranted removal under the federal officer removal statute. In fact, this Court's precedent is clear that "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). Moreover, this Court has emphasized that, "when a state proceeding presents a . . . pre-emption issue, the proper course is to seek resolution of that issue by the state court," because state courts are "presumed compe-

tent to resolve federal issues." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988).

For those reasons, Philip Morris's (allegedly) colorable preemption defense does not bring this case anywhere close to the historical justifications for federal officer removal. Under longstanding precedent, such a defense is properly heard in state court subject to this Court's discretionary review under 28 U.S.C. § 1257.

C. The Eighth Circuit's Assumption That Private Regulated Parties Have The Same Status As Government Contractors Is Unwarranted

In construing the "acting under" clause, the Eighth Circuit relied exclusively on case law involving government contractors' efforts to remove under § 1442(a)(1). *See* Pet. App. 6a-9a (citing and discussing *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 390 (5th Cir. 1998), and *Fung v. Abex Corp.*, 816 F. Supp. 569, 570-73 (N.D. Cal. 1992)). Those decisions, however, do not meaningfully address the text, history, or purposes of the removal statute. Nor do they, in any event, support removal by a private actor subject to federal regulation.

Some federal courts have held that — unlike private regulated parties, *see Wells Fargo*, 98 F. at 5-6 — government contractors, in certain circumstances, may avail themselves of the federal officer removal statute. *See, e.g., Ward v. Congress Constr. Co.*, 99 F. 598, 599, 604 (7th Cir. 1900) (removal under § 643 of Revised Statutes by a company "acting by the employment and under the authority of the treasury department"); *Bryant Bros. Co. v. Robinson*, 149 F. 321, 324-25 (5th Cir. 1906) (citing and explaining *Ward*); *Gulati v. Zuckerman*, 723 F. Supp. 353, 358-59 (E.D. Pa. 1989) (government contractor that was entitled to official immunity defense could remove under § 1442(a)(1)).

Those decisions rest on the view that a government contractor may be deemed an *employee* of the federal government when federal control and oversight of the con-

tractor is substantial and the tasks being performed are those that the government might otherwise perform itself. *See, e.g., Paldrmic v. Altria Corporate Servs., Inc.*, 327 F. Supp. 2d 959, 968 (E.D. Wis. 2004) (in government contractor cases, "[t]he actions for which the defendants were sued were required by the federal government, and the level of federal control of their conduct was such that they were de facto government employees"); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832 (N.D. W. Va. 2004) ("[C]ourts have applied the federal officer removal statute to private actors whose official functions are so intertwined with the federal government that they are effectively considered employees of the federal government."); *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (removal by government contractor is appropriate when contractor is so "intimately involved with government functions as to occupy essentially the position of an employee"). *See generally West v. Atkins*, 487 U.S. 42, 43, 51-52 (1988) (physician "under contract with the State to provide medical services to inmates at a state-prison hospital" was acting under color of state law).

If a private party contracting to perform governmental functions can be fairly thought of as an employee in performing that official function, then affording that party a right of removal may well accord with the text, history, and purposes of § 1442(a)(1). *See, e.g.*, H.R. Rep. No. 80-308, at A134 (1947) (explaining that the statute was "extended to apply to all officers and *employees* of the United States or any agency thereof") (emphasis added). Whatever the proper rule in those cases, however, comprehensiveness and detail of federal control are improper criteria for assessing whether a private regulated commercial actor sued for acts undertaken in compliance with federal law may remove under § 1442(a)(1). *See supra* Part I.D. The Eighth Circuit's reliance on government contractor cases is thus in error.

D. The Eighth Circuit's Test Would Substantially Expand Federal Jurisdiction

The Eighth Circuit's interpretation of the "acting under" clause would radically expand the jurisdictional compass of § 1442(a)(1). That addition to the jurisdiction of the federal courts would threaten legitimate interests of the States and would unnecessarily tax the resources of the federal judiciary.

1. Although the Eighth Circuit characterized the regulatory regime governing light cigarettes as entailing "an unusually high level of governmental participation and control," Pet. App. 13a, a comparison with other regulatory regimes that this Court recently has considered demonstrates that many regulated parties would comfortably satisfy the Eighth Circuit's test.

The federal government often imposes comprehensive safety regulations on entities engaged in dangerous activities. For instance, the federal government has long subjected the coal-mining industry to comprehensive, detailed regulation through the Federal Mine Safety and Health Act of 1977 ("FMSHA"), requiring mine operators to employ specific safety standards, to keep mine health and safety records, to provide employee safety training, and to submit to and assist in unannounced inspections of their mines. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 202-04 (1994); *see also Davis v. Eagle Coal & Dock Co.*, No. 33054, 2006 WL 3543017, at *1-*4 (W. Va. Dec. 4, 2006) (holding that, although the FMSHA and its "accompanying regulations . . . are detailed and comprehensive," FMSHA did not preempt state-law tort claims). To ensure immediate compliance with mine safety regulations, the government levies steep fines and imposes severe sanctions for violations. *See Thunder Basin Coal*, 510 U.S. at 204 ("The Secretary [of Labor] has broad authority to compel immediate compliance with [FMSHA] provisions through the use of mandatory civil penalties, discretionary daily civil penalties, and other sanctions.").

Furthermore, unlike the FTC's regulation of cigarettes, many federal regulatory programs dictate the design and manufacture of potentially dangerous products in addition to prescribing labeling and testing standards. *See, e.g.*, *Geier*, 529 U.S. at 875-76 (describing detailed federal regulatory scheme that mandates minimum requirements for safety features for motor vehicles and specifies methods by which those safety features must be tested); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662-68 (1993) (describing regulations controlling maximum train speeds and setting standards for warning equipment and signage that must be installed at railroad crossings under the Federal Railroad Safety Act of 1970). Likewise, the Food and Drug Administration ("FDA") heavily regulates drugs and medical devices, requiring manufacturers to comply with detailed standards for testing, approval, and labeling of these products. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 343 (2001) (describing "thorough review process" that FDA requires medical devices to undergo before entering marketplace); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 477 (1996) (federally mandated premarket approval process for new medical devices is "rigorous"). Pesticide manufacturers are also subject to comprehensive federal regulations pertaining to registration, labeling, and packaging of pesticides. *See Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 437-39 (2005) (describing the Federal Insecticide, Fungicide, and Rodenticide Act as "a comprehensive regulatory statute") (internal quotation marks omitted).

Given the holdings in those cases that certain claims brought under those statutes are not preempted by federal statute, a holding in favor of Philip Morris would threaten to transform the companies in those regulatory contexts into federal officers capable of removing claims that would not even be subject to federal preemption. And, in light of the government's extensive regulation of a wide range of private commercial actors even when preemption is not an issue, the Eighth Circuit's test would

give any number of parties a basis to invoke the removal jurisdiction of the federal courts.

2. Affording private regulated commercial actors a right to remove state-law claims to federal court based on nothing more than their compliance with federal regulation would substantially alter the balance of jurisdiction between state and federal courts, undermining important interests of the States in at least two respects.

At the most fundamental level, a substantial increase in federal officer removal jurisdiction would undermine the sovereignty interest of the States in having their own judicial forums available to their citizens to vindicate offenses, both civil and criminal, against state law. Our system of federalism embodies the principle that state, not federal, courts should be the primary arbiters of state law.[11] That principle is especially apt here given the historic role that States have played in policing unfair and deceptive consumer and business practices. *See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (noting the "long history of state common-law and statutory remedies against . . . unfair business practices" and that such regulation "is an area traditionally regulated by the States"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (holding that "prevent[ion] [of] the deception of consumers" was "well within the scope of California's police powers").

This Court's "deeply felt and traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes" rests in part on a "'[d]ue regard for the rightful independence of state gov-

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[11] *See Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 407 (1981) (Brennan, J., dissenting) ("state courts remain the preferred forum for interpretation and enforcement of state law"); *cf. Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499-500 (1941); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

ernments.'" *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379-80 (1959) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)); *see also Shamrock Oil & Gas*, 313 U.S. at 108-09. The independence and sovereignty of state courts is diminished when private regulated commercial actors (such as Philip Morris) wrest state-law actions from state court based on mere compliance with federal regulation. *See* Kenneth S. Rosenblatt, *Removal of Criminal Prosecutions of Federal Officers: Returning to the Original Intent of Congress*, 29 Santa Clara L. Rev. 21, 28 (1989) (history of federal officer removal statute "indicates that Congress used the remedy sparingly, as befits a threat to state sovereignty").

Beyond the basic sovereignty interest at stake in the proper construction of § 1442(a)(1), an increase in federal officer removals by private regulated parties would impede the enforcement of state consumer protection statutes. Owing to "crucial and probably inherent [institutional] limitations," the FTC has "strongly endorsed and emphasized the need for complementary state law enforcement work." William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 729 n.10 (1972). With the FTC's encouragement, "[a]ll fifty states and the District of Columbia have enacted at least one statute . . . aimed at preventing consumer deception and abuse in the marketplace." National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 41 (4th ed. 1997). Those state statutes "incorporat[e] the FTC Act concepts of deception and unfairness and . . . provid[e] significant state and private remedies"; they are thus "particularly important" in redressing "marketplace misconduct and abuse of consumers" because the FTC Act provides for "only FTC enforcement and not state or private enforcement." *Id.*[12]

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[12] Congress has expressly endorsed this system of dual state and federal enforcement. *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 13, 108 Stat. 1691, 1696-97 ("The [FTC] shall review its statutory responsibilities to identify those matters

Removals under § 1442(a)(1) by private regulated parties would undermine the effectiveness of these state consumer protection remedies. Litigation in federal courts is ordinarily more expensive than litigation in state court and may also be substantially slower. *See, e.g.*, Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 404 (1992) (finding that both plaintiff and defense attorneys agree that "federal court litigation is more expensive to undertake" than state court litigation). Indeed, this Court has previously recognized the substantial burdens that removal can have on state-law enforcement. *See Mesa*, 489 U.S. at 138 (noting that "[i]n . . . our Nation's large but less populous States the distance and accompanying burdens on state prosecutors" of litigation in federal court may be especially "acute"). Expanding the federal officer removal statute to include private regulated commercial actors could thus deter or otherwise hinder legitimate, and socially beneficial, state efforts to combat unfair and deceptive consumer practices.

3. Apart from skewing the federal-state jurisdictional balance, an expansive reading of the "acting-under" clause would unnecessarily burden the federal judiciary. In analogous circumstances, this Court has cautioned that the federal diversity statute should be strictly construed to "reliev[e] the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts." *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941) (internal quotation marks omitted).

That principle weighs heavily against the Eighth Circuit's legal standard here. A construction of the "acting under" clause that allows removal by private regulated parties would give federal courts jurisdiction over a wide array of cases that have traditionally been litigated in

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within its jurisdiction where Federal enforcement is particularly necessary or desirable and those areas that might more effectively be enforced at the State or local level.").

state court. Such an allocation of jurisdiction, especially one effected by judicial interpretation, would unnecessarily burden the federal judiciary, with substantial consequences for the efficient operation of federal courts. *See* William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1, 4, 7-9 (1993) (overburdening the federal courts will result in a "decline in the high quality of justice the nation has long expected of the federal courts," and a key to avoiding that result is to limit "inefficient allocations of jurisdiction"); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 Emory L.J. 1147, 1147 (1994) ("Unrestrained growth in . . . jurisdiction is undermining the effective functioning of the federal judiciary.").

III. THE FTC'S "REGULATION" OF LIGHT CIGARETTES IS INSUFFICIENT TO TRANSFORM PHILIP MORRIS INTO A PERSON "ACTING UNDER" A FEDERAL OFFICER

Even under the Eighth Circuit's test, or any standard that attaches significant weight to the comprehensiveness and detail of federal regulation, Philip Morris is not a person "acting under" a federal officer in marketing and selling light cigarettes.

A. The 1970 Voluntary Agreement Does Not Establish That Philip Morris Is Entitled To Federal Officer Removal

The Eighth Circuit concluded that the 1970 voluntary agreement of major tobacco companies, including Philip Morris, to disclose tar and nicotine levels in advertising constituted comprehensive and detailed regulation of Philip Morris sufficient to warrant federal officer removal. *See* Pet. App. 10a-12a. That analysis is seriously flawed.

First, the FTC has broad authority to prescribe regulations "defin[ing] with specificity acts or practices which are unfair or deceptive," 15 U.S.C. § 57a(a)(1)(B), and it has issued hundreds of pages of such regulations, *see* 16 C.F.R. Pts. 17-901. Not a *single* one of those pages con-

cerns cigarettes. *See id.* Pt. 408 ("Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking") (intentionally left blank). The FTC has never attempted to regulate the design or manufacture of cigarettes. Nor has the FTC ever promulgated any regulations requiring cigarette makers to test the tar and nicotine levels of their cigarettes, defining how such tests must be conducted, dictating how those results must be disclosed, or describing how the test results should be used in cigarette advertising.

Second, the FTC was not a party to the 1970 voluntary agreement, and it lacks the legal authority to enforce it. The FTC never *required* the adoption of the Cambridge Filter Method, as the D.C. Circuit's decision in *Brown & Williamson* confirms. That court ordered a modification of a district court injunction regulating Brown and Williamson's marketing of light cigarettes. *See* 778 F.2d at 44-45. The injunction "place[d] the burden on B & W to justify the advertisement of results from a different system of testing which it considers superior to the FTC system, even if B & W includes a prominent disclaimer explaining that the rating comes from a new system comparable to that used by the FTC and other manufacturers." *Id.* at 44. The court held that provision to be unlawful, reasoning that, "[b]ecause the FTC has not adopted its system of testing pursuant to a *Trade Regulation Rule* under section 18 of the FTC Act, one cannot say that the FTC system constitutes the *only* acceptable one available for measuring milligrams of tar per cigarette." *Id.* (emphases added, citation omitted).

Third, the absence of extensive regulation of light cigarettes, notwithstanding the voluntary agreement, is made obvious by the FTC's proposed revisions in 1997 to its cigarette testing methodology. In a notice inaugurating that rulemaking, the FTC sought comment on whether to define light cigarette descriptors and observed that there are no "official definitions" for descriptors such as "low tar" and "light." Notice, *Cigarette Testing: Request for*

Public Comment, 62 Fed. Reg. 48,158, 48,163 (1997); *see also* Amended Final Opinion at 1631 n.52, *United States v. Philip Morris USA, Inc.*, Civ. A. No. 99-2496 (GK) (D.D.C. Aug. 17, 2006) ("the FTC does not impose, regulate, or require [the use of light descriptors]"; "[h]ow those terms are applied, and on which brands, is entirely up to the tobacco companies") (internal quotation marks and alterations omitted), *at* http://www.dcd.uscourts.gov/opinions/2006/99-2496-082006a.pdf.

Even more telling is that major cigarette companies, including Philip Morris, filed joint comments with the FTC stating that "[t]he manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." Comments of Philip Morris Inc., *et al.*, at 94, *On the Proposal Entitled FTC Cigarette Testing Methodology*, FTC File No. P944509 (filed Feb. 5, 1998). Then, in 2002, Philip Morris urged the FTC to "adopt a rule expressly authorizing the industry to continue to use [light] descriptors." Philip Morris Petition for Rulemaking Concerning Tar and Nicotine Testing and Disclosure at 34 (FTC filed Sept. 18, 2002). The FTC's proposed regulation of light descriptors, as well as the positions of the tobacco companies, demonstrates that the Eighth Circuit is simply wrong in its belief that the FTC has comprehensively regulated light cigarettes.

Fourth, there is nothing exceptional about the detail of the Cambridge Filter Method. The Eighth Circuit deemed it important that the FTC specified the parameters for testing tar and nicotine in cigarettes. *See* Pet. App. 8a (citing Notice, *Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (1967)). But, given that the purpose of the Cambridge Filter Method is to standardize testing, and thereby to provide an objective basis for comparison of different brands, *see Brown & Williamson*, 778 F.2d at 37, it is far from extraordinary that the FTC specified some conditions for testing, such as butt length and

sample size. It would have been surprising had the FTC not made those specifications.

In short, the 1970 voluntary agreement does not make Philip Morris a party "acting under" a federal officer, even under a control test. The FTC has never mandated use of the Cambridge Filter Method, has never defined the descriptors "light" and "low tar," and has never requested or required the marketing of light cigarettes.[13] There is simply no basis for concluding that Philip Morris, in its marketing of light cigarettes, was "acting under" a federal officer for purposes of § 1442(a)(1).

B. The FTC's Cessation Of Cigarette Testing Does Not Entitle Philip Morris To Federal Officer Removal

The Eighth Circuit considered it significant that "the FTC itself conducted the entire testing process [of light cigarettes] for twenty years" and then "require[d] the cigarette manufacturers to conduct the testing to its specifications." Pet. App. 9a. But the FTC has never *required* any tobacco company to test its cigarettes. The testing that the Eighth Circuit found significant was the product of the 1970 voluntary industry agreement. *See* 62 Fed. Reg. at 48,158 & n.5.

Furthermore, there is nothing exceptional about product testing requirements in the context of federal regulation. Government testing is a familiar aspect of many regulatory regimes. *See, e.g.*, Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82

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[13] *See, e.g., United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) ("The specific advertisements which the Government claims were intentionally misleading . . . were certainly not mandated by the FTC."); *see also Paldrmic*, 327 F. Supp. 2d at 966-67 (design and manufacture of Marlboro Lights were "acts that most assuredly were not performed under the direct and detailed control of the FTC"); *Virden*, 304 F. Supp. 2d at 846 ("[T]he FTC did not mandate the use of [the Cambridge Filter Method], did not direct [Philip Morris] to 'trick' the testing procedure, and did not require [Philip Morris] to disseminate misleading information.").

Cornell L. Rev. 773, 789 (1997) ("[p]ublic testing programs" are "often created as part of a regulatory program"). The National Highway Traffic Safety Administration, for example, conducts its own program of crash and rollover testing of automobiles, gives vehicles ratings based on that testing, and prescribes standards governing use of those ratings in advertising. *See* http://www.SaferCar.gov. In addition, the Environmental Protection Agency ("EPA") both requires fuel economy testing by automobile manufacturers themselves and conducts its own fuel economy tests at its National Vehicle and Fuel Emissions Laboratory. *See* http://www.epa.gov/fueleconomy/data.htm.

Nor is it unusual for product testing responsibilities to be imposed upon private actors. Such testing requirements are imposed under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and the Toxic Substances Control Act ("TSCA"). *See* John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 Colum. L. Rev. 261, 263 (1991) (observing that "provisions of the [FIFRA] and the [TSCA] . . . authorize EPA to require the chemical and pesticide industries to undertake toxicological and other testing of their products") (footnotes omitted); *see also* 7 U.S.C. § 136a (requiring disclosure of testing data in pesticide registration); 15 U.S.C. § 2601(b)(1) (stating congressional policy that testing for chemical substances "should be the responsibility of those who manufacture and those who process such chemical substances").

Moreover, the EPA has prescribed detailed testing procedures relating to emission standards for all varieties of engines. *See, e.g.*, 40 C.F.R. Pt. 86, Subpt. N (heavy-duty highway engines); *id.* Pt. 92, Subpt. B (locomotives); *id.* Pt. 1065 (recreational vehicles). In addition, the Department of Energy requires manufacturers of refrigerators, freezers, dishwashers, water heaters, clothes washers and dryers, air conditioners, television sets, home heating equipment, kitchen ranges and ovens, fluorescent light

tubes, showerheads, and toilets to use prescribed test methods to measure the energy and water use efficiency of their products. *See* 10 C.F.R. § 430.23; *see also id.* Pt. 430, Subpt. B, Apps. A1-Z (detailing the specific testing procedures for measuring energy and water consumption of products, ranging from furnaces to showerheads).

For those reasons, nothing about either the FTC's testing of cigarettes or its decision to cease testing demonstrates that Philip Morris faced uniquely comprehensive or detailed federal regulation in its marketing and sale of light cigarettes.

C. The FTC's Consent Orders With Other Tobacco Companies Do Not Show That Philip Morris Is Heavily Regulated

The Eighth Circuit treated consent orders entered into by the FTC and *other* parties as pillars of the purportedly comprehensive *industry-wide* regime governing light cigarettes, and concluded that petitioners' claims "directly implicate[d] the enforcement and wisdom of the FTC's tobacco policies" embodied in those consent orders. Pet. App. 15a. That conclusion is mistaken because an FTC consent order, though enforceable against the parties to the order, has no binding legal effect on non-parties.

1. Congress has made clear that the binding effect of FTC consent orders is limited to those who are party to the decrees. Before 1994, the FTC Act provided that, "[i]f the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty . . . against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (1988). In 1994, Congress amended that provision to codify, with respect to civil penalties, the FTC's longstanding practice of not according precedential effect to consent orders. The provision now states: "[i]f the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with

respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty . . . against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (emphasis added). Through that provision, Congress instructed that FTC consent orders are a unique category of agency orders that should not be treated as establishing industry-wide standards.

The legislative history of the 1994 amendment confirms that understanding. In explaining the reason for the amendment, the House Report states unequivocally that "a case settled by a consent agreement would not qualify as a precedent for a section [45(m)(1)(B)] proceeding because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding." H.R. Rep. No. 103-138, at 14 (1993). The Report contrasted consent orders, which involve no factual or legal determinations, with cease-and-desist orders, which issue "after all factual and legal issues have been fully adjudicated." *Id.* In addition, the Report stated that it was "the FTC's current practice not to seek penalties based upon nonrespondent violations of outstanding consent agreements and this subsection codifies that practice." *Id.*

2. This Court has confirmed that an FTC consent order has no legal effect on those who were not parties to it. In *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), du Pont challenged a district court's order requiring divestiture by pointing to FTC consent decrees not requiring divestiture entered in similar cases. This Court rejected the argument, reasoning that "the circumstances surrounding *such negotiated agreements* are *so different* that they cannot be persuasively cited in a litigation context." *Id.* at 330 n.12 (emphases added). The teaching of *du Pont* is straightforward: because FTC consent orders reflect a negotiated compromise, they are neither binding on nor available as a legal safe-harbor for non-parties.

3. Consistent with *du Pont*, the FTC has routinely held that consent orders are not "controlling case prece-

dent." *In re Chrysler Corp.*, 87 F.T.C. 719, 742 n.12 (ALJ decision 1975, adopted as modified by full Commission 1976); *see also, e.g., In re Telebrands Corp., et al.*, Docket No. 9313, 2004 FTC LEXIS 154, at *125 (ALJ decision, Sept. 15, 2004) (citing *du Pont* for proposition that "[t]he fact that the [FTC] has previously accepted consent orders with a performance bond . . . does not provide sufficient legal foundation to impose such a bond in this case"). That is so because "[consent] orders are negotiated by the parties" and "they are not based on any finding of violation, a necessary predicate to an adjudicated order." *In re Chrysler Corp.*, 87 F.T.C. at 742 n.12; *see also In re Trans Union Corp.*, 118 F.T.C. 821, 864 n.18 (ALJ decision 1993, affirmed as modified by full Commission 1994) (a "consent agreement [with one party] is binding only between the Commission and [that party]").[14]

The rule that FTC consent orders have no legal effect on non-parties reflects the realities of FTC enforcement actions. Consent orders, by their nature, reflect compromises between the parties and therefore do not represent the FTC's full and considered views. *See United States v.*

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[14] The FTC's position on the legal effect of its consent orders is longstanding. *See, e.g., In re Beatrice Foods Co.*, 86 F.T.C. 1, 50 (ALJ decision 1973, adopted as supplemented and modified by full Commission 1975) ("In contrast to the procedures in a divestiture order, a consent order entered into by the Commission is not an adjudication on the merits of a matter and is not binding. The Commission in such a proceeding does not determine the legality or illegality of the conduct involved, consent orders contain no complete findings of fact, and many of the factors considered are known only to the Commission and are not a part of the public record. The courts and the Commission have consistently held that a consent decree is not a binding judicial precedent because of these factors, as well as the fact that they are based entirely upon the bargaining of the parties.") (citations omitted); *In re Berger*, 56 F.T.C. 1000, 1003 n.3 (ALJ decision, adopted as modified by full Commission 1960) ("[t]he orders issued in each of these cases were based on consent agreements" and thus "they cannot be considered as legal precedents"); *In re Federal Employees' Distrib. Co.*, 56 F.T.C. 550, 574 (ALJ decision, adopted by full Commission 1959) (holding that case cited "resulted in a consent order under agreement of parties and is not a precedent in other cases for any purpose").

Armour & Co., 402 U.S. 673, 681-82 (1971). The FTC "may settle for less stringent provisions . . . because of the public interest savings in time, money, and uncertainty which the settlement will provide." Stephanie W. Kanwit, *Federal Trade Commission* § 12:4, at 12-9 (2004) (hereinafter "Kanwit-*FTC*") (internal quotation marks omitted); *see also General Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) (FTC may settle to avoid "the expense, delay and risks of litigation"); *cf. Armour*, 402 U.S. at 681-82. A private party's agreement with a consent order likewise often depends on considerations such as the "uncertainty and expense" of litigation and a desire to "preserve the confidentiality" of the matter. Kanwit-*FTC* § 12.4, at 12-9.

4. Finally, the circumstances surrounding the 1971 and 1995 consent orders strengthen the understanding that they were not intended to serve as industry-wide rules. At the time of the 1971 order, the FTC "could only recover civil penalties from a respondent which violated a cease and desist order that had been previously issued *against it*." Kanwit-*FTC* § 10:7, at 10-32 (emphasis added). In 1975, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act authorized the FTC to bring an action against any person that violated a cease-and-desist order. That change enabled the FTC to use cease-and-desist orders "to legislate prospectively and put businesses on notice of acts or practices that have been adjudged to be unfair and deceptive." *Id.* at 10-33. Thus, at the time of the 1971 consent order, even if the FTC had issued a fully adjudicated *cease-and-desist* order against American Brands, that order could not have had any legal effect on Philip Morris. It follows *a fortiori* that the 1971 *consent* order could not regulate Philip Morris's activities.

In addition, nothing in the text of the consent orders suggests that they were intended to have industry-wide application. The 1971 order made clear that American Brands' "signing of the agreement . . . is for settle-

ment purposes only and does not constitute an admission . . . that the law has been violated." JA 206. Moreover, the order was carefully limited to "American Brands, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device." JA 207. Similarly, the 1995 order stated that "the signing of said agreement is for settlement purposes only and does not constitute an admission . . . that the law has been violated." *In re American Tobacco Co.*, 119 F.T.C. 3, 9 (1995). Those provisions would have been unnecessary — indeed, inappropriate — were the FTC aiming to promulgate a *de facto* industry-wide rule.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

STEVEN EUGENE CAULEY
JAMES ALLEN CARNEY
MARCUS N. BOZEMAN
CAULEY, BOWMAN, CARNEY & WILLIAMS, PLLC
11311 Arcade Drive
Suite 200
Little Rock, Arkansas 72212
(501) 312-8500

DAVID C. FREDERICK
Counsel of Record
MARK L. EVANS
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

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APPENDIX

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1442 provides:

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

28 U.S.C. § 1443 provides:

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.